Paper No. 12
JQ

THIS DISPOSITION IS NOT
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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re All American Beverage Inc.

Serial No. 75/235,920

J. Jay Guiliano of Hancock & Estabrook for applicant.

Robert L. Lorenzo, Trademark Examining Attorney, Law Office 101 (Jerry Price, Managing Attorney).

Before Quinn, Walters and Holtzman, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application has been filed by All American Beverage Inc. to register the mark Z'LEKTRA SPORT for "non-carbonated soft drinks."[1]

The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act on the

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[1] Application Serial No. 75/235,920, filed February 4, 1997, based on a bona fide intention to use the mark in commerce. The word "Sport" is disclaimed apart from the mark. The application includes the following statement: "The wording 'Z'LEKTRA' has no meaning, foreign translation or significance in the relevant trade or industry or as applied to the goods."

ground that applicant's mark, if applied to applicant's goods, would so resemble the previously registered mark Z SPORT for "non-carbonated, non-isotonic soft drinks"[2] as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney filed briefs. An oral hearing was not requested.

Applicant urges that the refusal be reversed, contending that the marks are distinguishable, and that the letter "Z" is weak in the beverage field. In connection with this latter argument, applicant has relied upon two third-party registrations (Z for bottled drinking water, and Z-FLAKES for, inter alia, soft drinks, fruit drinks and juices, and vegetable drinks and juices).[3]

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[2] Registration No. 2,079,695, issued July 15, 1997. The word "Sport" is disclaimed apart from the mark.

[3] Applicant initially made, in a response to an Office action, a mere reference to the registrations. The Examining Attorney, in his final refusal, correctly indicated that the registrations were not properly made of record. See In re Duofold Inc., 184 USPQ 638, 640 (TTAB 1974). The Examining Attorney then went on to state that even if properly made of record, the registrations were of limited probative value. Applicant then submitted a "request for admittance into record," accompanied by a copy of Reg. No. 1,093,372 which was obtained from the PTO's web site. Applicant's brief was accompanied by a copy of the other registration, Reg. No. 2,120,122, again retrieved from the PTO's web page. The Examining Attorney, in his brief, objected to the evidence on the basis that "these copies are not official copies obtained from the PTO's search library nor were they obtained from the PTO's automated search system." As in the case of his final refusal, the Examining Attorney went on to consider the

The Examining Attorney maintains that the marks are similar in that both contain the letter "Z" and the term "SPORT." The Examining Attorney argues that applicant has appropriated the entirety of registrant's mark and merely added the suggestive wording "LEKTRA" (for "electrolyte") to it. Pursuant to the Examining Attorney's request in his brief, we take judicial notice of the dictionary definitions of the terms "electrolytes," "sports drink" and "electrolyte drink."

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. Federated Food, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

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probative value of the registrations as if this evidence were of record.

Although we question the timeliness of applicant's post-appeal submission of the two registrations (see Trademark Rule 2.142(d)), a point not raised by the Examining Attorney, the copies retrieved from the PTO's web page are acceptable as official records. As to the timeliness problem, since the Examining Attorney did not object on this basis, we are exercising our discretion, and have considered the registrations to be of record in this appeal.

Insofar as the goods are concerned, applicant concedes that they are "the same." Indeed, for purposes of our analysis, registrant's and applicant's goods are legally identical, and are presumed to move through the same channels of trade to the same classes of purchasers. Further, the products, both being in the nature of soft drinks, would appear to be relatively inexpensive and, therefore, the subjects of impulse purchases.

Turning to a consideration of the marks Z SPORT and Z'LEKTRA SPORT, we note, at the outset, that if the goods are identical, "the degree of similarity [between the marks] necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). We find that the marks Z SPORT and Z'LEKTRA SPORT, when viewed in their entireties as applied to legally identical products, engender sufficiently similar overall commercial impressions such that confusion is likely. Both marks begin with the letter "Z" and end with the term "SPORT." And, although the term "SPORT" has been disclaimed apart from each mark, its inclusion cannot be ignored. Giant Food, Inc. v. National Food Service, Inc., 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1985). As pointed out by the Examining Attorney, and as essentially

acknowledged by applicant, the "LEKTRA" portion of applicant's mark suggests that applicant's beverage contains electrolytes. The mere addition of the suggestive "LEKTRA" portion to applicant's mark does not sufficiently distinguish the mark from registrant's mark. In finding that the marks are similar, we have kept in mind the normal fallibility of human memory over time and the fact that consumers retain a general rather than a specific impression of trademarks encountered in the marketplace.

The two third-party registrations submitted by applicant do not compel a different result in this case. The registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, and the existence on the register of confusingly similar marks cannot aid an applicant in its effort to register another mark which so resembles a registered mark as to be likely to cause confusion. AMF Inc. v. American Leisure Products, Inc., 474 F.2d 1403, 177 USPQ 268 (CCPA 1973); and Lilly Pulitzer, Inc. v. Lilli Ann Corp., 376 F.2d 324, 153 USPQ 406 (CCPA 1967). Further, as noted by the Examining Attorney, neither of the marks include both the letter "Z" and the term "SPORT" as in the case here.

We conclude that consumers familiar with registrant's non-carbonated soft drinks sold under its mark Z SPORT

would be likely to believe, upon encountering applicant's mark Z'LEKTRA SPORT for non-carbonated soft drinks, that the products originated with or are somehow associated with or sponsored by the same entity.

Decision: The refusal to register is affirmed.

T. J. Quinn

C. E. Walters

T. E. Holtzman
Administrative Trademark Judges, Trademark Trial and Appeal Board